No. 94-1256

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

CITY OF EDGERTON, AND EDGERTON SAND & GRAVEL, INC.,

Plaintiffs-Respondents-Petitioners,

vs.

GENERAL CASUALTY COMPANY OF WISCONSIN,
Defendant-Appellant-Respondent,

WISCONSIN INSURANCE SECURITY FUND,
Defendant,

AETNA CASUALTY & SURETY COMPANY,
Defendant-Co-Appellant-Respondent,

HANOVER INSURANCE COMPANIES, WAUSAU INSURANCE COMPANIES, AND LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION FOR RESPONDENT AETNA CASUALTY & SURETY COMPANY

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QUESTION PRESENTED

Are "response costs" paid voluntarily under the supervision of the Wisconsin Department of Natural Resources, essentially equivalent to "response costs" as defined in § 107(a)(4)(A) of CERCLA, paid "as damages" pursuant to the terms of an insurance policy issued to a Wisconsin policyholder?

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HANOVER INSURANCE COMPANIES, WAUSAU INSURANCE COMPANIES, AND LOCAL GOVERNMENT PROPERTY INSURANCE FUND,

Defendants.

BRIEF IN OPPOSITION FOR RESPONDENT AETNA CASUALTY & SURETY COMPANY

This brief is respectfully submitted by respondent Aetna Casualty & Surety Company (Aetna) in opposition to the petition for writ of certiorari filed by the joint petitioners, City of Edgerton and Edgerton Sand & Gravel Company.[1]

STATEMENT OF THE CASE

A. Aetna's Position

Respondent Aetna respectfully submits that this court should not review the decision of the Wisconsin Supreme Court. While petitioners cast the issue as one of federal statutory construction, a brief review of the Wisconsin Supreme Court's decision reveals that, in actuality, the court decided only questions of state law regarding the meaning of certain phrases, including the phrase "as damages," in an insurance policy. As such, this Court's jurisdiction is not truly invoked and this Court's attention is not merited.

B. Facts of Record

i) Introduction

Petitioners' recitation of the procedural history of this case is, for the most part, accurate. However, some of their statements regarding the facts and procedural history warrant clarification.

ii) Procedural History

The Court should note that this action was commenced by filing of a summons and complaint on December 29, 1990. On

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1. Pursuant to Rule 29.1 of the Supreme Court Rules, Aetna Casualty & Surety Company states that it is a wholly owned subsidiary of Aetna Life & Casualty Company.

March 25, 1991, petitioners filed motions for summary judgment. (R.36). Respondents filed cross-motions for summary judgment and requested a continuance in order to conduct discovery. (R. 47, 48, 55). On May 7, 1991, one day before the summary judgment hearing, petitioners filed a 43-page reply brief and four new affidavits. (R.61). Over respondents' objections, the trial court conducted the motion hearing on May 8, 1991, and issued a written decision on May 10, 1991. (R.85). The petitioners submitted findings of fact and conclusions of law drawn entirely from the affidavits they had submitted; the trial court signed the document despite respondents' objections. (R.88, 122). The basis for the defense objections included not only the lack of opportunity to conduct discovery regarding the facts, including complex scientific "facts" regarding hydrogeology as stated by environmental lawyer/hydrogeologist Charles (Buck) Sweeney (one of the principals of Edgerton Sand & Gravel), but also the trial court's refusal to recognize disputed questions of fact related to Mr. Sweeney's deposition testimony and its divergence with his averments.

Although the trial court never expressly ruled on respondents' motion for a continuance, it appears that its haste to decide the motion was based on petitioners' assertions that a WDNR deadline (as referred to on page 6 of the petition) was looming.

In its haste to enter judgment for petitioners, the trial court went so far as to enter a judgment requiring Aetna to defend and indemnify the City of Edgerton even though Aetna never insured the City. (R.96). This error was corrected by the Court of Appeals of Wisconsin (Pet. App. 152).

Respondent Aetna lays out this procedural history as a background for understanding its contentions regarding the unreliability of the underlying facts as set forth by petitioners.

It should be noted that petitioner Edgerton Sand & Gravel, in a motion not joined by the City of Edgerton, has moved the court for vacation of its judgment on the grounds that the author of the majority opinion, Justice Janine Geske, must be disqualified on the grounds that she has a significant interest in the outcome of the suit. The motion is not technically timely filed pursuant to Rule 809.64, Wis. Stats. Aetna has challenged its timeliness. The Wisconsin Judicial Commission has concluded, in a separate investigation relating to this accusation, that it is meritless. Justice Geske has made this finding a part of the court record. In very similar circumstances, the Wisconsin Supreme Court has not only denied such a motion, but has done so sharply rebuking the moving party. *See State v. American T.V. & Appliance*, 151 Wis. 2d 175, 443 N.W. 2d 662 (1989). It appears likely that this motion will be denied in the near future.

iii) Factual Background.

Petitioners represent that the Edgerton Sand & Gravel Landfill was used for waste disposal for local residents, municipalities and industries, and that the wastes disposed of included ashes, garbage and rubbish. (Pet. 4). However, the landfill was licensed only for municipal waste, not industrial or hazardous waste. (R.5 at 44).

Petitioners also assert that the alleged contamination by volatile organic compounds (VOCs) found in groundwater at or near the site was caused by a slow and continuous migration of VOCs into the water supply. (Pet. 4-5). Buck Sweeney, whose affidavit provides the factual source of this contention, conceded in his deposition that he had also previously represented that the source of the contamination was a sudden rupture of the natural clay pan underlying the landfill site. (R.51 at Ex. 51). Mr. Sweeney's change of theory regarding how the contamination occurred coincided with the Wisconsin appellate courts' change

in interpretation of the pollution exclusion in general liability policies in *Just v. Land Reclamation, Ltd.*, 155 Wis. 2d 737, 456 N.W. 2d 570 (1990).

The remainder of petitioners' facts discuss the process by which the Wisconsin Department of Natural Resources and the United States Environmental Protection Agency sought to ensure voluntary clean-up of the landfill site. (Pet. 5-7). The petitioners' recitation of the facts exaggerates the tone of the EPA and WDNR correspondence and fails to point out that the "deadlines" imposed by the agencies were, in fact, not enforced. Thus, these recitations were disputed at the lower court levels. It should be pointed out, also, that petitioners' inclusion of these "facts" was directed at a different issue than that presented here — the issue of whether a "suit" had been instituted. Thus, given their limited relevance to this petition, respondent Aetna simply points out that these "facts," too, are disputed.

Petitioners do accurately quote the policy language at the heart of this petition. (Pet. 7).

SUMMARY OF ARGUMENT

This petition does not merit this Court's exercise of certiorari. First, no real issue of federal substantive law exists. Instead, the Wisconsin Supreme Court merely decided an issue of state law, the meaning of the term "damages" as used in an insurance policy. Because this question is one of state law, no true conflict between the circuits and state courts of last resort exists; instead, each is applying the insurance law of the particular state. Nor is there any reason to pre-empt state law here. For all these reasons, this Court should deny this petition for certiorari.

REASONS FOR DENYING THE WRIT

I.

THE WISCONSIN SUPREME COURT'S DECISION INVOLVES PRIMARILY A QUESTION OF STATE LAW AND DOES NOT MERIT THIS COURT'S REVIEW.

Supreme Court Rule 10.1 sets forth the character of reasons that are considered appropriate for the Supreme Court's discretionary review. This petition meets none of those criteria.

A review of the Wisconsin Supreme court's decision in this case reveals that the two issues that court considered involved only questions of insurance policy coverage, questions decided by reference to long-standing Wisconsin law regarding insurance policy construction. A necessary part of that review involved determining whether the monies sought, response costs payable pursuant to the Wisconsin equivalent of CERCLA, were payable "as damages" as that term is used in Wisconsin insurance policies. To answer that question, the Wisconsin Supreme Court did examine the statutes and federal regulations creating and controlling CERCLA. However, petitioners' characterization of the decision as one determining an important substantive point of federal law is, like their characterization of the WDNR and EPA letters, nothing more than hyperbole.

This Court has long stressed that its role is not to review matters of state law. *See, e.g., Huddleston v. Dwyer*, 322 U.S.232, 237 (1944). Consistent with such statements, this court has denied certiorari in insurance coverage disputes governed by state law. *See, e.g., Eli Lilly v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1060 (1987); *Eagle Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co.*

of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert denied*, 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-eight Insulations*, 633 F.2d 1212 (6th Cir. 1980); *cert denied*, 454 U.S. 1109 (1981). In fact, this Court has denied certiorari in at least five cases presenting the same question presented here, the meaning of the phrase "as damages" pursuant to the law of the state governing construction of that policy. *See Independent Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940 (D.C. Cir. 1991), *cert denied sub nom., Certain Underwriters at Lloyd's London v. Independent Petrochemical Corp.*, __U.S.__, 112 S. Ct. 1777 (1992); *Gerrish Corp. v. Universal Underwriters Ins. Co.*, 947 F.2d 1023 (2nd Cir. 1991), *cert denied sub nom., Universal Underwriters Ins. Co. v. Gerrish Corp.*, __U.S.__, 112 S. Ct. 2939 (1992); *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200 (2nd Cir. 1989), *rehearing denied*, 894 F.2d 498, *cert denied*, 496 U.S. 906 (1990); *Continental Insurance Companies v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) (en banc), *cert denied sub nom., Missouri v. Continental Ins. Cos.*, 488 U.S. 821 (1988); *Maryland Cas. Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

Presentation of this same issue now does not suddenly warrant review. Not only does the issue remain one of state law, in itself a reason for this Court to deny review, the issue as framed by petitioners is not squarely raised on these facts. Thus, even if the Court were interested in addressing the issue framed by petitioners, this case does not present it with an appropriate factual context for such a discussion.

Petitioners cite to *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) and *Key Tronic Corp. v. United States*, __U.S.__, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994), as cases with which the Wisconsin Supreme Court's decision conflicts. However, the *Union Gas* and *Key Tronic* cases presented far different issues and fact situations than in this case. In *Key Tronic*, this Court

and fact situations than in this case. In *Key Tronic*, this Court considered what monies were recoverable pursuant to CERCLA rules for liability in a contribution action; specifically, the issue was whether certain attorneys' fees were recoverable. This Court focused on 42 U.S.C. § 9607, which sets forth the scope of the liabilities CERCLA imposes on private parties. In *Union Gas*, the issue before this Court was whether it was constitutional for private parties to sue a state in a CERCLA contribution action, an issue involving the interplay of the Commerce Clause and the Eleventh Amendment.

In both *Key Tronic* and *Union Gas*, this Court considered directly the United States Code provisions comprising CERCLA in a CERCLA contribution action, once examining the provisions of the legislation and the other time examining not only its scope but its constitutionality. Here, the issue is not a question directly regarding the scope of CERCLA, but instead, the issue is what relief a party liable under CERCLA may be able to obtain from its insurer via the contract between them. Neither *Key Tronic* nor *Union Gas* is even on point; more importantly, there is no conflict between their holdings and that of the Wisconsin Supreme Court, which did not consider, even remotely, the same issues. As Justice Holmes observed in *Town v. Eisner*, 245 U.S. 418, 425 (1918): "A word is not a crystal, transparent and unchanged; it is the skin of a living thought, and may vary in color and content according to the circumstances and the time in which it is used." The context of this case is different than that in *Key Tronic* and *Union Gas*, and thus, there is no conflict.

Nor does the Wisconsin Supreme Court's decision conflict with the language or intent of CERCLA itself, as petitioners argue. First, CERCLA's express language defines certain monies payable as response "costs" both in enforcement actions and private party actions, 42 U.S.C. § 9607(a)(4)(A), while defining other monies payable as natural resource "damages," 42 U.S.C.

the plain language of the statute when determining whether the monies sought were payable pursuant to the terms of the parties' insurance contracts.

Second, the Wisconsin Supreme Court's decision is fully in accord with CERCLA's intent. Petitioners argue that CERCLA expressly contemplated that insurance coverage could be purchased to assist PRP's in paying for clean-up costs. (Petition at 15, *citing* 42 U.S.C. § 9607(e)(1)). While CERCLA did contemplate that such coverage could exist, it did not go so far, as petitioners assert, as to obliterate the terms of already existing contracts. Coverage was not mandated, it was allowed where purchased. It was not purchased by these petitioners. Thus, a finding that the policy the petitioners purchased did not have such coverage does not thwart CERCLA in any way.

Petitioners exaggerate the existence of a federal question just as they exaggerate the meaning of plain cases and statutes. There is nothing here that merits review by this Court.

II.

THERE IS NO CONFLICT IN THE CIRCUITS AND STATE COURTS REGARDING THIS ISSUE.

In *Erie Ry. Co. v. Tompkins,* 304 U.S. 64 (1938), this Court required federal courts sitting in diversity cases to apply state substantive law whenever it is controlling. The *Erie* doctrine recognizes the rights of the states to make their own laws except where pre-empted by federal law. The fact that other state courts construing insurance contracts under their own state law rules of contract construction, and other federal courts construing state law under the *Erie* doctrine, have reached different conclusions does not present a "conflict" within the traditional meaning of this Court's exercise of certiorari jurisdiction. There is no

"conflict" among the circuits and state courts of last resort of the type this Court should undertake to resolve. In fact, pursuant to the *Erie* doctrine, this is the very type of conflict which is contemplated in a federal system such as ours.

Nonetheless, petitioners seek to have this Court resolve that "conflict" on the grounds that, if state courts do not uniformly find insurance coverage for pollution clean-ups, CERCLA will be thwarted. However, as noted above, petitioners can point to no provision of CERCLA authorizing such a sweeping change in the rights of parties to private contracts. Not only has such an approach been rejected by federal courts, this Court has denied certiorari in such cases. *See, e.g., American Policyholder Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256 (1st Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 682 (1994). Certiorari should likewise be rejected here as CERCLA itself expressly rejects such a uniform approach. *See*, 42 U.S.C. § 9672(a), stating: "Nothing in this subchapter shall be construed to affect . . . the law governing the interpretation of insurance contracts of any state."

The result petitioners desire is expressly contrary to the very law they claim they seek to enforce. Under the circumstances, review by this Court is simply not merited.

CONCLUSION

Petitioners present this Court with no real issues to address. This case does not squarely present the factual basis for the issue they assert, nor does it squarely present the legal issue. In fact, the true issue in this case is one of state law contract interpretation, an issue which does not merit this Court's attention. For all of these reasons, respondent Aetna Casualty and Surety Company respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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